RAMAYEE GENGAN & ORS.

v.

TAN YIK KOK & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
MOHAMED DZAIDDIN J
[CIVIL SUIT NO. P 121 OF 1980]
22 FEBRUARY 1983

TORT: *Negligence - Only witness not an eye witness - A submission of "no case to answer" - Burden of proof - Quantum of damages.*

CIVIL PROCEDURE: *Submission of "no case to answer" - Effect of - Agreed bundle of documents - Relevance of.*

DAMAGES: *Quantum.*

The plaintiffs claimed damages for negligence against the defendants as a result of a collision along Jalan Cheras, Kajang. The only witness for the plaintiffs was the widow of the driver (deceased) of the motor taxi involved in the accident and her evidence was solely on the loss of earning and on dependency. The defendants submitted "no case to answer".

Held:
On Liability

[1] As the first plaintiff did not adduce any evidence of how the collision had taken place, the Agreed Bundle of Documents could be considered to discover whether negligence might be reasonably inferred against the defendants. Those documents need not be proved. [*Henry Trading Co. Ltd. v. Harun* [1966] 2 MLJ 281].

[2] The police reports and the sketch plan together with its key formed part of the evidence admitted in the case.

[3] There was no case to answer. The plaintiffs had failed to prove negligence. In an action of negligence the burden of proof falls upon the person alleging it. The balance of probabilities was in fact in favour of the driver of the motor taxi being negligent.

On Quantum

[1] In anticipation of an appeal, and since both parties had submitted on it, it was fair and proper the Court should consider quantum of damages.

[2] Had the plaintiffs proved negligence, the award for damages based on 100% liability would be RM14,875 being loss of dependency and RM544 special damages. The loss of dependency must be divided into pre-trial loss calculated as special damages and after-trial loss. [*Cookson v. Knowles* [1978] 2 All ER 604; *Lim Poh Choo v. Camden Health Authority* [1979] 2 All ER 910; *Kho Nee Hin v. Selimah bte. Abdul Ghani & Ors.* [1981] 2 MLJ 138].

[Plaintiff's Claim dismissed.]

Cases referred to:
Simirah v. Chua Hock Lee & Anor. [1963] MLJ 239
Henry Trading Co. Ltd. v. Harun [1966] 2 MLJ 281
Cookson v. Knowles [1978] 2 All ER 604
Lim Poh Choo v. Camden Health Authority [1979] 2 All ER 910
Kho Nee Hin v. Selimah bte. Abdul Ghani & Ors. [1981] 2 MLJ 138

Other sources referred to:
Supreme Court Practice, 1979, Vol . 1, p. 571
Charlesworth on Negligence, 6th Edn., para. 216

For the plaintiffs - P.G. Segran; M/s. Manuel & Segran
For the defendants - Joga Singh; M/s. V.P. Nathan & Partners

JUDGMENT

Mohamed Dzaiddin J:

In this running down case, the plaintiffs claim damages for negligence against the defendants as a result of a collision at 10th Milestone, Jalan Cheras, Kajang, on 7 March 1978 between motor taxi No. NF 1765 driven by the first plaintiff's husband, deceased, and a motor lorry No. WJ 9605 driven by the first defendant which was travelling from the opposite direction. The fact of an accident having taken place at the time and place mentioned therein is not disputed by the defendants. But what is in issue is their negligence as alleged by the plaintiffs.

The only witness for the plaintiffs was Ramayee d/o Gengan, the widow of Gopal s/o Visiravel, deceased, the driver of motor taxi NF 1765. Her evidence was solely on the loss of earning and dependency. There was absolutely no other evidence from her regarding this accident as she had not witnessed the collision. The plaintiffs closed their case at the conclusion of the first plaintiff's evidence.

Counsel for the defendants then informed the Court that he would submit there was "no case to answer". Before deciding whether to accept his request, I reminded Counsel of the election available to the defence and that his case would stand or fall on his submission of "no case to answer". Counsel indicated that he would abide by such decision.

In allowing Counsel's application, I relied on the English practice. In the *Supreme Court Practice* 1979, Vol. I, p. 571, under heading "No Case to Answer", it is stated as follows:

> As to the inconvenience of asking a Judge sitting alone to hold that there is no case to answer at the conclusion of the evidence of the party on whom the onus lies, see *Alexander v. Rayson* [1936] 1 KB 169. **The Judge should generally refuse to rule on such a submission by the defendant unless he makes it clear that he does not intend to call evidence** [*Laurie v. Raglan Co.* [1942] 1 KB 152 CA]. But the Judge is not bound so to refuse, and if he does not put the party to his election whether to call evidence or not, the latter retains his right to call it if his submission fails [*Young v. Rank* [1950] 2 KB 510; *Storey v. Storey* [1961] p. 63 CA]. A submission of no case may be made either if no case has been established in law or the evidence led is so unsatisfactory or unreliable that the Court should hold that the burden has not been discharged [*ibid*. and *Yuill v. Yuill*, [1945] p. 15).

In addition to the *White Book*, I also rely on the decision of Thomson CJ (as he then was) in *Simirah v. Chua Hock Lee & Anor.* [1963] MLJ 239. At p. 241, he stated as follows:

> Having come to that conclusion the question then arises what this Court should do in view of the course taken at the trial by Counsel for the defendants when he submitted that there was no case to answer.
>
> It is a great pity that when this submission was made the advice of Goddard, LJ, (as he then was) in the case of *Parry v. Aluminium Corporation, Ltd.* was disregarded. His Lordship there observed that in cases of negligence if a Judge is to rule at the end of the plaintiff's case that the plaintiff had made out no case it is most desirable that he should put Counsel for the defence to his election as to whether he wishes to call evidence for the defence and should

refuse to give a ruling unless Counsel elects to call no evidence. That statement as to the practice which should be followed in such circumstances has been approved again and again [*Laurie v. Raglan Building Co. Ltd., supra; Yuill v. Yuill; Storey v. Storey*].

In the present case, Counsel for the defendants submitted that the plaintiffs have failed to prove negligence. It is settled law in an action for negligence the burden of proof falls upon the plaintiff alleging it. It is for him to give evidence of the facts on which he bases his claim.

His evidence may consist of facts **proved** or **admitted**, and after it is concluded two questions arise: (1) whether on that evidence negligence may be reasonably inferred, and (2). Whether assuming it may reasonably be inferred, it is in fact inferred. During the course of the trial, the legal burden rests upon the person alleging negligence throughout as distinguished from the provisional burden of proof which is raised by the state of the evidence, and which shifts to the other side to rebut any presumption so raised. In so far as the case for the plaintiff, the legal burden rests upon him throughout the case. *Charlesworth on Negligence*, 6th Edn. para. 216.

Now, the first plaintiff in her oral evidence did not adduce any evidence of how the collision had taken place. In the event, I have to consider any facts admitted and whether from that evidence negligence may be reasonably inferred against the defendants.

At the commencement of the trial, an Agreed Bundle of Documents was by agreement admitted and marked as Exhibits AD 1-6. The first three documents were certified true copies of police reports of P.C. Abdul Rahim bin Darus who received a telephone message about a collision at 10th Milestone, Jalan Cheras, between a lorry and a motor taxi; then there was a report of the driver of motor lorry, the first defendant; and, lastly, a report of Ismail bin Yahaya, the Bandaraya Enforcement Officer, made on the following day stating that he received information about the death of the taxi driver. There was also a certified copy of the police sketch plan and its key. The law with regard to the admission of the content of documents agreed between parties is clear. Where there is an Agreed Bundle of Documents, there is no need to prove these documents - see *Henry Trading Co. Ltd. v. Harun* [1966] 2 MLJ 281. Following this decision, I hold that the police reports and the sketch plan together with its key formed part of the evidence admitted in this case.

Let us first consider the police report of the first defendant. He stated that he left Port Dickson at about 4.30 p.m. on the material date driving motor lorry trailer registration No. WJ 9605 for Kuala Lumpur. He reached 10th Milestone, Jalan Cheras, Kajang, at about 6.00 p.m. It was then raining heavily and as such he was driving at about 26 miles per hour. Suddenly he noticed a motor taxi approaching from the opposite direction. It was travelling in an unsteady manner. On seeing this, he tried to avoid the said taxi, which continued travelling towards him and collided into his motor lorry. Secondly, the position of both vehicles after impact is shown in the sketch plan (Exhibit AD4). The motor taxi was facing in a horizontal position to the main road with both front wheels lying beyond the centre line of the road into the motor lorry's side of the road. The position of the motor lorry appeared to be on its correct side of the road. Point 'O' on the sketch plan indicated the position of the front mudguard of the taxi lying in front of the motor lorry on its side of the road. Point 'N' indicated broken pieces of glasses which are around on the motor lorry's side of the road and nearer to the centre white line. Thus, from these documents, it is a reasonable inference that the motor taxi had collided against the front off-side of the motor lorry on its wrong side of the road. The motor taxi being a lighter vehicle could have avoided the collision had it been keeping a proper lookout and travelling on the correct side of the road towards Kajang. I am of the

view that the motor taxi was travelling nearer to the centre of the road when it collided with the opposite vehicle. Further, from the position of both vehicles as shown in the sketch plan, I am also of the view that the first defendant had tried to take avoiding action but could not have done so.

For the above reasons, the balance of probabilities was in favour of the driver of the motor taxi being negligent.

Having dismissed the plaintiff's claim, I need not proceed to consider quantum of damages. However, in anticipation of an appeal against my decision and since both Counsel have submitted on quantum, it is fair and proper that I should do so now.

The deceased was a taxi driver aged 48 years old at the time of the accident and allegedly earning an average income of RM600 per month. He predeceased the wife who at the date of trial was 44 years old and had nine children, four of whom are infants. The ages of these children range between 14 years and 28 years. Except for the first daughter (second plaintiff), the rest of the children are staying with the widow (the first plaintiff). According to her, the deceased plied his taxi along Seremban/Kuala Lumpur and Seremban/Melaka routes. After paying for the rental and deducting his other expenses in running the taxi, the deceased used to give her RM560 as monthly maintenance for the family. She also stated that she herself was earning about RM170 per month as a rubber tapper. All in all, she claimed a sum of RM560 being the loss of dependency.

It has been the practice to assess the loss of dependency by taking a straight multiplier at the date of trial and assess the dependants' pecuniary loss. However, the House of Lords case in *Cookson v. Knowles* [1978] 2 All ER 604 has held that it is proper to assess loss of dependency from the date of death to the date of trial based on actual pecuniary loss of the dependants which would be calculated like special damages; and from the date of trial onwards the sum to be calculated would be by taking the earnings which the deceased would have been receiving at the date of trial and then applying the proper multiplier. In other words, the loss would be divided into two parts, namely, the pre-trial loss and after-trial loss of dependency.

The principle has been applied in *Lim Poh Choo v. Camden Health Authority* [1979] 2 All ER 910, and has also been followed in *Kho Nee Hin v. Selimah bte. Abdul Ghani & Ors*. [1981] 2 MLJ 138. The practical guidelines in applying this method to dependency on death may be summarised as follows:

(1) Estimate the net dependency at death, i.e. net earnings.

(2) Calculate this loss as special damages to the date of trial.

(3) Estimate the deceased's expectation of working life as at death.

(4) Calculate the rate of dependency at the date of trial.

(5) At this point, there is a difference from the living plaintiff, whose expectation of life is calculated at the trial, because he is still alive. Under a death claim, the expectation is fixed once for all at death: so a deduction is made for the period for which special damages have been awarded.

(6) A multiplier or number of "years" purchase is then taken from an annuity table, being the multiplier required to produce an annuity for the remaining period of expectation of life.

Applying the above principles to this case, the first point for determination is the number of "years" purchase. In determining this purchase, the most important question is: how long would the deceased have continued to live if he had not met with this accident? If the deceased was wholly dependent upon his personal earnings, what matters is not so much his full expectation of life as his expectation of working life. Thus, the deceased was 48 years old at the time of accident and was working as a taxi driver. In my opinion, it is fair and reasonable that being a taxi driver, his useful working life should be up to the age of 55 years bearing in mind that driving motor taxi is quite a strenuous occupation. This leaves him with seven years of actual working life from the date of his death which should be reduced further by two years for contingencies and also for the fact that the dependants would be getting a lump sum payment. Therefore, the number of years purchase would be five years. In arriving at this figure, I have also taken into consideration of the fact that the expectation of life of the dependants have to be considered because their loss of support continues only during their life-time. As the widow may possibly remarry and the children being adults would be able to get employment, the loss of dependancy or support could be further decreased.

Then, we have to determine the net earnings in relation to the rate of dependency. The estimate of the net contribution to the family income is a question of fact to be determined based on the evidence. I cannot accept the first plaintiff's evidence that the deceased used to give her for support the sum of RM560 per month. Even assuming that the deceased was earning an average of RM600 per month, I am quite sure that the rental and its expenses in running a taxi would cost him easily RM200 a month. This would leave him about RM400. Again, we have to consider his own expenses, e.g., his meals during the period when he plied his motor taxi to Kuala Lumpur or Melaka. I feel it is reasonable that it would cost him RM150 a month. Therefore, in the circumstances of this case, it is fair and reasonable to assess the loss of dependency at RM250 a month. As the loss of dependency is calculated on the basis of the loss of income multiplied by the number of year's purchase, the amount would be RM12,990. However, if I were to apply the principle of *Cookson v. Knowles* for the pre-trial loss, the amount would be more. This is because such amount would have to be calculated as special damage and, therefore, based on the loss of dependency at RM250 per month multiplied by the number of months from date of death (7 March 1978) to date of trial (21 February 1983), which is 59½ months, the total would therefore be RM14,875. As there would only be a difference of half a month between the actual period and the number of years purchase of five years, it is my view that the after-trial loss of dependency need not be assessed. Moreover, as the pre-trial loss would be more than the amount calculated on the basis of loss of dependency, it is my judgment that the pre-trial loss calculated by way of special damages should be awarded as loss of dependency. In the circumstances, I would award the sum of RM14,875 under this heading.

With regard to special damages, both Counsel agreed to items 1, 2 and 3 of "particulars of special damages" amounting to RM44. However, with regard to funeral expenses, the first plaintiff alleged that she incurred RM1,000. Although she has not proved this amount strictly, I feel it is fair and reasonable to award her RM500 as funeral expenses. I should also consider the question of damages for pain and suffering since the deceased did not die instantaneously. However, as the period was only about 1½ hours from the time of accident until the time of death, it is my view that the pain and suffering would not be sufficient enough for the deceased to be entitled to damages under the said heading.

In the circumstances of the case, had the plaintiffs proved negligence against the defendants, my award for damages based on 100% liability would be as follows:

(i) general damages RM14,875 being loss of dependency;

(ii) special damages RM544;

(iii) interest at the rate of 4% per annum on special damages;

(iv) costs.

Also found at [1983] 1 CLJ 326